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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DAVID P. MICHAELS, TRUSTEE OF
MARIN MOTOR OIL, INC.,
Petitioner,

v.

OFFICIAL UNSECURED CREDITORS' COMMITTEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Question Presented

1. Whether Section 1109 of the Bankruptcy Code, 11 U.S.C. §1109(b) should be construed as granting an absolute right to official creditors committees and other parties in interest to intervene in adversary proceedings commenced by a Chapter 11 trustee pursuant to Rule 701 *et seq.* of the Rules of Bankruptcy Procedure.

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5 Collier Bankruptcy Practice Guide, ¶83.08(6), p. 83-21 (1st ed.) 10

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

David P. Michaels, Trustee of Marin Motor Oil, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Parties

The Appellants in the consolidated appeals before the Third Circuit were David P. Michaels, Trustee of Marin Motor Oil, Inc. and Nicholas Marin, Nick-O-Mar Realty

Corp., Petrobras Company, Inc., Marin Retail Gasoline Sales Company, Marin Oil Co., Inc., Fra-Mar, Inc., Marin Mercantile Oil Exchange, Marin Drilling Corp., and Marin Holding Company. Appellee below was the Official Unsecured Creditors' Committee of Marin Motor Oil, Inc. The Honorable Hugh M. Leonard, United States Trustee for the Districts of New Jersey and Delaware, was also named as an Appellant below but did not participate in the appeal.

Opinions Below

The opinion of the court of appeals (App. A, *infra*, 1a-26a) is reported at 689 F.2d 445. The oral opinion of the district court (App. C, *infra*, 29a-39a) and the letter opinion of the bankruptcy court (App. D, *infra*, 40a-43a) are unreported.

Jurisdiction

The judgment of the court of appeals (App. B, *infra*, 27a-28a) was entered on September 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutes and Rules Involved

This petition involves the interpretation of Section 1109 (b) of the Bankrutpcy Code, 11 U.S.C. §1109(b) which provides:

> "A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter."

This case also involves Rule 24(a) and (b) of the Federal Rules of Civil Procedure and Rule 724 of the Rules of Bankruptcy Procedure.

F.R.C.P. 24(a) and (b) provides:

> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Rule 724 of the Rules of Bankruptcy Procedure provides:

> "Rule 24 of the Federal Rules of Civil Procedure applies in adversary proceedings except that a person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 705."

Statement of the Case

On April 21, 1981 a proceeding for a reorganization under Chapter 11 of the United States Bankruptcy Code was filed by Marin Motor Oil, Inc. ("the debtor") in the United States Bankruptcy Court for the District of New Jersey. The debtor operated its business as a debtor in possession until the appointment of a trustee on May 19, 1981.

On May 15, 1981, prior to the appointment of the trustee, the official creditors' committee ("the committee") filed a complaint in the bankruptcy court against various corporations owned or operated by the debtor's principal or members of his family seeking a judgment extending the Chapter 11 proceedings over said companies.

On May 18, 1981, the defendants named in the committee's complaint filed a motion to dismiss on the grounds that the committee lacked standing to bring the complaint.

On May 19, 1981, David P. Michaels was designated as trustee in the chapter 11 proceedings by the United States Trustee for the Districts of New Jersey and Delaware pursuant to an order of the bankruptcy court authorizing the appointment of a trustee. On July 2, 1981, an order dismissing the committee's complaint was entered by the bankruptcy court. Said order was stipulated and agreed to by the attorneys for the committee, the trustee and the defendants.

On July 14, 1981, the trustee, invoking the jurisdiction conferred by 28 U.S.C. §1471, instituted a complaint in the bankruptcy court against Nicholas Marin, Ilse Marin and Marin Holding Company, Inc. seeking the imposition of a constructive trust for the benefit of the debtor estate upon a single family residence held in the name of Marin Holding Company, Inc. On July 17, 1981, the trustee, invoking the same jurisdictional grant, filed a complaint in the bankruptcy court against Nicholas Marin and Ilse Marin and eight corporations owned or controlled by the Marins and their children seeking to extend the Chapter 11 proceedings to include the defendants.

The trustee filed an amended complaint on October 6, 1981. On January 5, 1982 the bankruptcy court entered an order consolidating the two actions.

Both of the trustee's complaints were filed pursuant to Rule 701 *et seq.* of the Rules of Bankruptcy Procedure and constitute adversary proceedings with the meaning of said Rule.

On October 5, 1981, the committee filed a notice of motion, returnable the following day, seeking permission to intervene in the above referenced adversary proceedings on the basis of Section 1109(b) of the Bankruptcy Code. Following oral argument, the bankruptcy court entered an order, consistent with its letter opinion of October 22, 1981, denying the committee's motion to intervene but granting it the status of *amicus curiae* in the adversary proceedings with participation limited to the submission of briefs on all factual and legal issues.

The committee filed an appeal with the district court on October 22, 1981 pursuant to 28 U.S.C. §1334(a). On November 9, 1981, in a bench opinion, the district court reversed the decision of the bankruptcy court holding that

Section 1109(b) conferred upon the committee an absolute right to intervene. The district court entered an order consistent with this ruling on November 12, 1981.

On November 25, 1981, the defendants in the adversary proceedings lodged an appeal from the district court order with the court of appeals, which appeal was assigned docket number 81-3083. The trustee lodged an appeal with the court of appeals on December 2, 1981, pursuant to the same jurisdictional grant, which appeal was docketed as case number 81-3084. Upon application of appellants, the appeals were consolidated.

On September 29, 1982, the court of appeals issued its decision affirming the order of the district court and holding that Section 1109(b) grants all interested parties the absolute right to intervene in any adversary proceedings commenced in the bankruptcy court.

ARGUMENT

The decision of the court of appeals that 11 U.S.C. §1109(b) grants parties in interest as defined in the statute the absolute right to intervene in adversary proceedings commenced by a trustee should be reviewed by this Court because it incorrectly decided an issue of profound importance to the administration of the federal bankruptcy laws certain to arise with frequency.

Section 1109(b) of the Bankrupcty Code designates certain named entities as "parties in interest" and confers upon them the right to raise and appear and be heard on any issue in a case under Chapter 11 of the Bankruptcy Code.

In construing this provision the court of appeals held that the right of interested parties to appear and be heard

includes the absolute right to intervene in adversary proceedings commenced in the bankruptcy court by way of complaint pursuant to Rule 701 *et seq.* of the Rules of Bankruptcy Procedure. This decision was based upon what the court of appeals determined to be the express language of Section 1109(b) as well as upon policy considerations favoring full participation by interested parties. Analysis of the statute and relevant policy considerations reveals that the court of appeals erred on both counts.

The fundamental error of the court of appeals was its failure to recognize the distinction between a "case" under Chapter 11, as that term is used in Section 1109(b), and an "adversary proceeding" commenced in a Chapter 11 proceeding by way of complaint filed in the bankruptcy court. The word "case", as used in Section 1109(b), is not defined in the Bankruptcy Code. However, Section 301 of the Bankruptcy Code, 11 U.S.C. §301, governs the filing of voluntary "cases" under Chapter 11 and provides:

> "A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter."

This language must be contrasted with Bankruptcy Rule 703 which provides:

> "An adversary proceeding is commenced by filing of a complaint with the court."

Bankruptcy Rule 701 specifies that requests for certain specified types of relief must be brought as adversary proceedings by the filing of a complaint pursuant to Rule 703.

From these provisions the differences between a Chapter 11 "case" and "adversary proceeding" becomes readily apparent, and the proper construction of Section 1109(b) becomes clear. A "case" as the term is used in Sections 301 and 1109(b) refers to the general administration of a Chapter 11 proceeding leading up to the confirmation of a plan of reorganization by the bankruptcy court. As such it necessarily includes such steps as the appointment of a trustee, the formulation and confirmation of a plan of reorganization, the award of allowances, the dismissal of a case or a conversion to another chapter of the Bankruptcy Code, and similar issues constituting integral steps in the administration of a reorganization proceeding.

Creditors committees, individual creditors, shareholders, and the other parties in interest listed in Section 1109(b) have legitimate interests in participating in such administrative aspects of a Chapter 11 case—an interest recognized by Congress in enacting Section 1109(b). Such administrative steps are, however, distinct and separate from controversies brought before the court by way of complaint seeking, for example, the recovery of money or property.

The use of the term "case" in Section 1109(b) when coupled with the clearly recognized distinction between cases and adversary proceedings indicates that the court of appeals was in error in concluding that Section 1109(b) by its express terms grants interested parties the right to intervene in every litigated matter commenced in the bankruptcy court. Had Congress so intended, it is logical to assume that it would have expressly stated that Section 1109(b) was applicable to adversary proceedings or otherwise indicated that it was intended to cover actions for specific relief commenced by way of complaint, as opposed to general issues arising in the administration of a Chapter 11 case.

This conclusion is buttressed by the legislative history of Section 1109(b). The original Senate version of Section 1109 contained in S. 2266 was captioned "right to be heard" and provided in relevant part:

> "Any creditor, stockholder, or an indenture trustee shall have the right to be heard as a party in interest in a case under this chapter in person, by an attorney, or by a committee."

In contrast, the provision contained in H.R. 8200 passed by the House of Representatives was labeled "intervention" and provided as follows:

> "The Securities and Exchange Commission or an indenture trustee may raise and may appear and be heard on any issue in a case under this chapter, but the Securities and Exchange Commission may not appeal from any judgment, order, or decree entered in the case."

Section 1109(b) as finally adopted by Congress obviously represented a compromise between the Senate and House versions. While Congress chose to expand the parties covered by the statute beyond those enumerated in the original House bill, it also modified the House version by substituting the caption "right to be heard" for the caption "intervention." Because "intervention" is a term of art generally applicable to litigated matters, by striking reference to this term Congress can be deemed to have chosen not to make Section 1109(b) applicable to adversary proceedings.

It is also important to note that the proposed legislation recommended in the 1973 *Report of the Commission on the Bankruptcy Laws of the United States,* contained a specific provision dealing with the right to intervene.

Section 2-205 of the Commission's proposed Bankruptcy Act provided in pertinent part:

> "(a) Standing to File Complaint in Bankruptcy Court; Intervention.
>
> Any person having a direct and substantial interest in any controversy or matter of which the Bankruptcy Court is given jurisdiction by Section 2-201 may file a complaint with the Court seeking relief in respect to such a controversy or matter, or may intervene in any civil action or preceeding pending in the Court that involved such a controversy or matter."
>
> Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, 93rd Cong. 1st Sess., Part II (1973) at p. 42.

The fact that Congress chose not to adopt the Commission's recommendation to include a specific provision dealing with intervention in litigated matters is a further indication that it intended Bankruptcy Rule 724 to have continuing validity to adversary proceedings.

In 5 *Collier Bankruptcy Practice Guide,* ¶83.08[6], p. 83-21 (1st ed.), the author notes that a distinction must be drawn between cases and adversary proceedings:

> "A creditors' committee is not necessarily a party to an adversary proceeding unless named as such, or unless it is permitted to intervene under Bankruptcy Rule 724.
>
> Although §1109(b) states that a party in interest, including a creditors' committee, 'may raise and may appear and be heard on any issue in a case under this chapter,' this does not necessarily mean that a creditors' committee may appear and be heard

> on any issue in every adversary proceeding pending in a case under Chapter 11. The creditors' committee is not required to be a party to an adversary proceeding, and notice to the creditors' committee of the commencement of an adversary proceeding is not required to be given under the Bankruptcy Code or the Bankruptcy Rules. Thus, neither the powers of the creditors' committee enumerated in §1103 nor the Bankruptcy Rules expressly entitle a creditors' committee to be heard of right in an adversary proceeding."

As this citation makes clear the right to intervene in litigation commenced in the bankruptcy courts is not among the enumerated powers of a creditors' committee conferred by Section 1103 of the Code, 11 U.S.C. §1103. This is yet another indication that the court of appeals incorrectly perceived the intended scope of Section 1109(b).

It is also clear that the court of appeals failed to properly analyze the policy considerations involved in the construction of Section 1109(b). Under the court of appeals' interpretation every creditor and stockholder of the debtor has the right to intervene in any complaint filed in the bankruptcy court. Such a construction, if allowed to stand, will mean that the bankruptcy court will be compelled to allow an unlimited number of individual creditors or shareholders to intervene in any adversary proceeding regardless of whether such parties have an actual interest in the outcome of the litigation, and regardless of the undoubted confusion that will be caused by multiple parties participating in a single action. In addition to depriving the trial court of all discretion to insure orderly proceedings, this interpretation will also result in a tremendous increase in the costs associated with the administration of bankruptcy cases.

In the instant Chapter 11 proceedings, the schedule of creditors filed by the debtor discloses a total of 82 creditors. The decision of the court of appeals compels the bankruptcy court to permit each of these creditors to intervene in all litigation commenced by the trustee, or any other party, to recover money or property for the estate, to determine the validity of liens, to obtain relief from the automatic stay or for any of the other types of relief specified in Bankruptcy Rule 701.

To carry the logic of the court of appeals' position even further, one can imagine a public corporation with thousands of shareholders and creditors filing for relief under Chapter 11. It strains credulity to believe that Congress intended that each creditor and shareholder would have the ability to intervene in any action commenced in the bankruptcy court no matter how remote its interest in the litigation.

The concern expressed by the court of appeals that interested parties be allowed full participation in Chapter 11 proceedings is more than satisfied by the interpretation of Section 1109(b) advanced herein, especially when coupled with the recourse available to interested parties to apply for intervention pursuant to Rule 724 of the Rules of Bankruptcy Procedure which adopts Rule 24 of the Federal Rules of Civil Procedure. The bankruptcy court clearly has the discretion, under the aforesaid rules, to allow interested parties, including a creditors' committee, to intervene in those adversary proceedings which directly involve its interests, when such interests are otherwise not adequately protected. To impose upon the bankruptcy courts the administrative and procedural burdens inherent in the decision of the court of appeals is clearly not necessary to satisfy the expectations of interested parties of full participation in reorganization proceedings.

The distinction between adversary proceedings and cases under Chapter 11 was recognized in the case of *In re Cloud Nine Ltd.*, 3 B.R. 199 (B.Ct. D.N.M. 1980). There, the bankruptcy court, recognizing that Section 1109(b) does not specifically include nor exclude adversary proceedings, cited with approval the case of *In re Watkins Investments*, 5 C.B.C. 253 (B.Ct. W.D. Tenn. 1975) for the principle that decisional law generally holds that the rule on intervention should be liberally construed but that such liberality does not permit indiscriminate intervention. Although *Watkins* was a pre-Bankruptcy Code decision, the court in *Cloud Nine Ltd.*, clearly was correct in relying on that case for guidance as to the liberality and discretion which must be employed in permitting intervention.

While in *Cloud Nine Ltd.*, the court permitted intervention, it did so based upon the recognition that the adversary proceeding involved, if decided in favor of plaintiff, would virtually destroy any opportunity to reorganize the debtor. Thus that particular adversary proceeding was clearly of utmost importance to the general unsecured creditor body. In such circumstances, Bankruptcy Rule 724 adequately protects the rights of interested parties.

Also instructive is the decision of the court in *In re Segarra*, 14 B.R. 870, 878 (B.Ct. D.P.R. 1981). There, the court, in addressing the question of whether individual creditors and creditors' committees have the right to intervene in adversary proceedings held:

> "Sec. 1109(b) provides that various entities including a creditor and a creditors' committee may appear and be heard on any issue in case. This section permits their intervention during the development of a Chapter 11 case when plans are being negotiated, the business conduct of a debtor being investigated, and the need for a trustee considered; this is

> the meat and potatoes of a Chapter 11. However, Congress has added to this standard bill of fare what we call adversary proceedings and has provided by creating our pervasive jurisdiction that they, too, may be heard by the Bankruptcy Court. But we do not read in the act or anywhere else that Congress intended in expanding our jurisdiction to create new causes of action in favor of creditors and committees. To the contrary, the Congressional history indicates that Congress was solely interested in providing an additional forum where existing causes might be heard. Thus Congress hoped to reduce the delays resulting from the prior division of the juridical business of bankruptcy courts. Sec. 1109(b) applies to cases and not to proceedings."

As the above analysis makes clear, the decision of the court of appeals in this matter, if allowed to stand, will impose tremendous burdens on the efficient administration of litigated matters in the bankruptcy courts. Such a burden is not required by the language of Section 1109(b), nor is it mandated by the policy considerations addressed by the court of appeals. It is therefore respectfully submitted that this Court should review the decision of the court of appeals to insure that future litgiation in the bankruptcy courts will proceed in a reasonable and orderly fashion and that debtor estates will not be burdened with the additional expenses of administration which are certain to be the consequence of the unbridled right of intervention mandated by the decision below.

CONCLUSION

For the reasons set forth it is respectfully submitted that the Petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: December 17, 1982

[APPENDICES FOLLOW]